No. 3518

United States Circuit Court of Appeals

For The Ninth Circuit

THE WEST SIDE IRRIGATING COMPANY, a corporation, *Appellant*,

—vs.—

THE UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. FRANK H. RUDKIN, *Presiding*.

REPLY BRIEF OF APPELLANT

CARROLL B. GRAVES,
606-8 Central, Bldg., Seattle, Wash.

HARTMAN & HARTMAN,
300-6 Burke Bldg., Seattle, Wash.
Attorneys for Appellant.

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STATEMENT

We vigorously assail the statement of appellee for the reason that it is an astonishing departure from well recognized rules, and an attempt to drag into a consideration of the points at issue matters not under consideration and which cannot be considered under the record here.

A statement is "the very lock and key to set open

the windows" of the case to be considered. Inaccuracy of statement, or a statement of matters which do not appear from the record in the case, however they may occur, inevitably tend to invalidate the conclusion drawn therefrom. Aside from ethical or legal considerations, accuracy is not achieved and the real points to be determined are obscured if the statement be given consideration.

The amended bill of complaint and second bill of complaint were attacked, not by answer, but by a motion to dismiss. This motion was not confined to urging any defense arising upon the face of the bill, but went further and by statement and argument contained in the motion, attempted to do the very thing which is again attempted in the statement at bar. See motion, p. 28, printed record.

Upon motion therefor, an order was made in the district court striking all parts of said motion except that portion which was based upon the ground that the amended complaint did not state facts sufficient to constitute a cause of action, and by agreement the motion was so argued. Printed record, p. 43. The final order and judgment granting this motion to dismiss expressly limited the order as having been made upon the motion as though it were a demurrer. Printed record p. 34.

It was within the right of appellee to have filed an answer to the bill and brought into the case all the material and relevant facts which may have been desired and which do not appear upon the face of the bill of complaint. The appellee did not chose

so to do, but elected to urge a motion to dismiss in the nature of a demurrer, and the case is brought here in that situation. The obvious and ill-advised attempt to bring into the consideration of the motion or demurrer, facts not apparent from the face of the bill, is an act subject to criticism and which sound practice will not condone.

In considering a motion to dismiss, the pleadings alone are involved.

New Equity Rule 29.

Hosler vs. Ireland, 219 Fed. 490, 135 C. C. A. 201.

Answering the part of appellee's statement deemed part of the record that appellee sought to secure agreements from appropriators reducing the amounts of their alleged appropriations, it has departed from the admitted facts in the case, that the Government sought only to avail itself of the surplus storage waters, and solicited agreements which would fix the maximum amount of water claimed by each appropriator. There is not the slightest foundation for the suggestion that appellant was asked to sign an agreement reducing its appropriation. On the contrary it was undisputed that appellant claimed the full amount, and signed the agreement solely because it understood it was so specified therein.

Again, appellee says in its brief, that the Secretary of the Interior required certain conditions to be met before the United States would approve the Yakima Project, and one of these was that written

agreements be secured reducing the amounts of alleged appropriations. Now, as this document is not before the court, we are at a disadvantage, as we are likewise concerning much of the statement and argument of counsel for appellee based upon alleged circumstances wholly outside of the record. But the only conditions we can find that appellee relied upon in the original case, as contained in the notice of the Secretary of the Interior are as follows:

> "First. The adjustment of all conflicting claims of those who are appropriating water from the Yakima River or any other body of water, for irrigation, power or any other purpose.
>
> "Second. The determination of all suits now pending to prevent the diversion of water from the Yakima River to the Yakima Indian Reservation, and any and all other litigation that in any way tends to embarrass or restrict the appropriation of the waters from said river or any other body of water needed for the irrigation of the lands under said proposed projects."

There was neither any conflict between the claim of appellant and any other appropriator, nor was appellant involved in any litigation whatever. The right of appellant to the amount of water it claimed then and claims now was unquestioned. In plain language, appellant was simply induced to sign the agreement when it was off-guard, whereby it was held to have parted with rights it was never asked to surrender and never intended to. Nor did it ever

receive any consideration or benefit therefor, but has only continued to use its own water, which has uniformly flowed through its canal for more than twenty years.

We do not agree with counsel for appellee in the assertion that issues here have been passed upon in the original case. And the testimony in that case as to measurements taken by the Geological Survey on some other issue are not controlling. Nor were such measurements any reliable test of the water appropriated and being used by appellant, as the evidence in that case, as well as much more accurate evidence now available, shows that the measurements were taken when the normal flow of water in appellant's canal was materially diminished for other reasons.

Correction should also be made of the statement on page 5 of appellee's brief, to the effect that this is an appeal from the order dismissing the amended bill of complaint and likewise the second amended bill. The motion of appellee to dismiss the amended bill of complaint was stricken on motion of appellant (Tr. pp. 43-44). The second amended bill of complaint was filed thereafter, and appellee's motion to dismiss was granted.

ARGUMENT

We are not going to enlarge upon the argument already made, but only to touch upon one or two things in the argument for appellee, which seem to require it.

Notwithstanding appellee complains that the order granting leave to file the bill of review was *ex parte*, and no opportunity given to file counter affidavits, it will be remembered that appellee did not file any counter affidavits, or make any showing whatever in contravention of the right to file a bill of review, but moved to dismiss the same on mere informal allegations of the evidence adduced upon the trial of the original case. There was nothing before the court upon which to base its order of dismissal, which was not before it when leave was granted to file the bill of review, and therefore no proper reason or grounds for overruling the order first entered.

Regarding the alleged rule requiring one bringing a bill of review to perform the decree in some cases, it is not applicable here. As counsel explains, it is invoked in any event only against bills filed solely for delay and vexation, of which it would be outrageous to accuse this appellant, after it has struggled for years to obtain redress from the Government in the shape of annulling the erroneous judgment, and all the time appellee has stood by without attempting to enforce the judgment, because of appellant's constant efforts, until departmental delays compelled it to bring the bill of re-

ADDITIONAL AUTHORITIES FOR REPLY BRIEF
IN CASE NO. 3518, UNITED STATES
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IRRIGATING COMPANY VS. UNITED STATES.

Where there has been no change in circumstances bills will lie to reform instruments because of mistake after a considerable lapse of time (16 Cyc. 158) Essex vs. Day (12 years) 52 Conn. 483. Lockwood vs. White, 65 Vt. 466, 26

Three years was held not a bar to an attack on a compromise. Cowan vs. Sap. 81 Ala. 525, 16 Cyc. 158, Note 72.

Acquiescence of plaintiff in a conflicting claim cannot be inferred by the court where no circumstances appear which call upon plaintiff for assertion of his rights. 16 Cyc. 159.

ADDITIONAL AUTHORITIES FOR REPLY BRIEF
IN CASE NO. 5618, UNITED STATES
CIRCUIT COURT OF APPEALS.

IRRIGATING COMPANY VS. UNITED STATES.

Where there has been no change in circumstances bills will lie to reform instruments because of mistake after a considerable lapse of time (16 Cyc. 158) Basex vs. Day (12 years) 52 Conn. 483. Lockwood vs. White, 65 Vt. 466, 26 Three years was held not a bar to an attack on a compromise. Cowan vs. Sap. 81 Ala. 525, 16 Cyc. 158, Note 72.

Acquiescence of plaintiff in a conflicting claim cannot be inferred by the court where no circumstances appear which call upon plaintiff for assertion of his rights.
16 Cyc. 159.

view for fear of losing its rights by such delays. Not only has appellant thus shown good reason why performance was waived, but it has sought to preserve its right by prescription and adverse possession as against appellee, and still claims and asserts such rights. The rule does not operate where good reason is shown for non-performance, or when performance would extinguish some right which the party has at law.

15 Cyc. 525;

Griggs vs. Gear, 8 Ill. 2;

Massie vs. Graham, 16 Fed. Cas. No. 9,263, 3 McLean, 41.

On page 12 of appellee's brief, sections of the Code of the State of Washington are set forth in part, taken from statutes of procedure under our state laws in cases of motions for new trial and vacation of judgments, usually required to be filed within one year. Counsel for appellee admit that the statutes quoted do not govern in this case. They are, therefore wholly inapplicable here. In fact, they have no bearing on the case at all. In view of the gravity of the situation which confronts appellant, to urge such an argument seems untimely, if not even trifling with the real questions at issue.

For counsel for appellee to stigmatize appellant's application as effrontery to the court, is unjust and uncalled for and especially when appellee's rights are inferior and subsequent to appellant's. Many farmers in this community face loss and ruin, if

they shall be deprived of the water, which is absolutely necessary to cultivate and mature their crops. Property rights which have been so long enjoyed should not be disturbed without gravest consideration. Counsel for appellant have endeavored, as best they may, to deal with a difficult situation, in order that the rights of appellant may be acknowledged and restored. There is no thought of effrontery, but only a sincere desire to have justice done, and that a fair trial of this matter may be had to the fullest extent. Impughning motives and casting aspersions does not conduce towards a just ending or right a wrong sustained. With this thought in view, we respectfully submit the case to the consideration of the court.

Respectfully submitted,

CARROLL B. GRAVES and
HARTMAN & HARTMAN,
Attorneys for Appellant.